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2005 LHC-00002, 2005-LHC-00003,
2005-LHC-00004

OWCP NOS.:01-157896, 01-157734, 01-157898,
01-157899, 01-157900

In the Matter of

STEVEN M. VALLEE
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insured

DECISION AND ORDER DENYING EMPLOYER'S MOTION FOR RECONSIDERATION AND GRANTING IN PART AND DENYING IN PART CLAIMANT'S MOTION FOR RECONSIDERATION

I. Statement of the Case

This proceeding arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq. (the "LHWCA"), and is currently before me on separate motions of Steven Vallee (the "Claimant") and the Bath Iron Works Corporation ("BIW") for reconsideration of the decision and order issued in the above matter on August 31, 2005 and served upon the parties by the District Director of the Office of the Workers' Compensation Programs/LHWCA on September 2, 2005. In that decision, the Claimant was found entitled to compensation for periods of temporary total and permanent total disability, interest on unpaid compensation and attorney's fees. His claim for coverage of medical care provided by a pain management specialist, Dr. Guernelli, was denied, and the Employer's request for liability relief from the Special Fund was also denied.

BIW mailed its Motion for Reconsideration on September 14, 2005 and requested leave until September 16, 2005 to file a supporting memorandum (respectively "BIW Motion" and "BIW Supporting Memo").[1] In its motion, BIW seeks reconsideration of the finding that the

[1] The Office of Administrative Law Judges received the Respondent's Motion for Reconsideration on September 14, 2005. On September 20, 2005, the Office of Administrative Law Judges received the Respondent's Memorandum in Support of the Motion for Reconsideration.

Claimant is entitled to permanent total disability compensation and the denial of its request for liability relief. On September 15, 2005, the Claimant responded in opposition to BIW's Motion ("Cl. Opposition #1"). The Claimant then mailed his own Motion for Reconsideration on September 16, 2005, seeking reconsideration of the finding regarding the applicable average weekly wage used to calculate his compensation rate and the denial of his claim for coverage of Dr. Guernelli's medical care ("Cl. Motion").[2] By letter dated September 21, 2005, the Claimant filed a Second Response to Motion for Reconsideration, objecting to BIW's September 16, 2005 supporting memorandum as untimely and, in the alternative, submitting arguments in response to those advanced by BIW in support of its motion for reconsideration ("Cl. Opposition #2"). BIW in turn responded to this objection on September 29, 2005, and it mailed a Motion in Opposition to the Employee's Motion for Reconsideration and Employee's Reply to Employer's Motion for Reconsideration on October 3, 2005 ("BIW Opposition").

Upon review, I find that both parties' motions were timely filed. Regarding the merits, I find that BIW has not established that reconsideration is warranted with respect to any of the issues addressed in its motion. I further find that reconsideration is warranted with respect to the prior denial of the claim for coverage of medical care provided by Dr. Guernelli, and I will amend the compensation order to require BIW to pay for such care. Otherwise, the Claimant's motion for reconsideration is denied.

II. Discussion

A. Timeliness and Sufficiency of the Motions

Both parties assert that the other's motion for reconsideration was not timely filed. A motion for reconsideration is timely when it is filed not later than ten days from the date the decision or order was filed in the Office of the District Director. FRCP 59(e); 20 C.F.R. § 802.206(b)(1); *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136, 138 (1989).[3] The ten day filing period runs from the date on which the District Director certifies that he filed the decision and order.[4] 20 C.F.R. § 802.206(b)(1); FRCP 6(a); *Hamilton v. Ingalls Shipbuilding, Inc.*, 30 BRBS 84, 87 (1996). In this case, the District Director certified that he filed the August 31, 2005 decision and order on September 2, 2005. Therefore, the ten day reconsideration filing period commenced on Saturday, September 3, 2005. Since FRCP Rule 6(a) provides with respect to

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[2] The Office of Administrative Law Judges received the Claimant's Motion for Reconsideration on September 20, 2005.

[3] The Federal Rules of Civil Procedure are applied because neither the Rules of Practice and Procedure for Administrative Hearings proceedings before the Office of Administrative Law Judge at 29 C.F.R. Part 18 nor the LHWCA Regulations at 20 C.F.R. Part 702 address motions for reconsideration of a decision issued by an ALJ. 20 C.F.R. § 18.1. The Benefits Review Board has held that Rule 6(a) applies to Rule 59(e), which is the basis for the 10-day filing time limit for motions for reconsideration codified at 20 C.F.R.§ 802.206. *Hamilton v. Ingalls Shipbuilding, Inc.*, 30 BRBS 84, 87 (1996); *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141, 144 (1999).

[4] The Board held that Rule 6(a) applies to Rule 59(e), which is the basis for the 10-day filing time limit for motions for reconsideration codified at 20 C.F.R. Section 802.206. *Hamilton v. Ingalls Shipbuilding, Inc.*, 30 BRBS 84, 87 (1996); *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141, 144 (1999).

computation of time frames that intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation when the period of time prescribed or allowed is less than 11 days, the last day for filing a timely motion for reconsideration was Friday, September 16, 2005. Documents are not deemed filed until received by the OALJ clerk. 29 C.F.R. § 18.4(c)(1). However, when a document is filed by mail, the OALJ rules further provide that five days shall be added to the prescribed period of time. *Id.* Therefore, a motion for reconsideration filed by mail could be received by the OALJ clerk as late as September 21, 2005 and still be considered timely. As noted above, BIW's motion was received on September 16, 2005 and is clearly timely. The Claimant's motion, which were received on September 20, 2005, is also timely by virtue of 29 C.F.R. § 18.4(c)(1) because it was filed by mail.[5]

The Claimant additionally contends that BIW's motion for reconsideration should be denied because it does not "state with particularity the grounds therefore" as required by 29 C.F.R. § 18.6(a) and because its supporting memorandum constitutes a reply brief prohibited by 29 C.F.R. § 18.6(b). Cl. Opposition #2 at 1-2.[6] Contrary to the Claimant's arguments, I find that BIW's motion satisfies the applicable pleading requirements as it identifies the issues on which reconsideration is sought, and because the motion specifies the relief requested. Further, BIW's supporting memorandum is just that, a memorandum of law in support of the motion for reconsideration, and not a reply brief. Moreover, even if one were to conclude, as urged by the Claimant, that BIW's motion lacks specificity, any deficiency was timely cured by the filing of the memorandum on September 20, 2005 within the prescribed period for receipt of a motion for reconsideration filed by mail.

B. The Merits of the Parties' Motions for Reconsideration

1. Availability of Reconsideration

A motion for reconsideration or "amendment of judgment" as it is known under FRCP 59(e) "must either clearly establish a manifest error of law or must present newly discovered evidence." *Bogosian v. Woloohojian Realty Corp*., 323 F.3d 55, 72 (1st Cir. 2003), *quoting Jorge Rivera Surillo & Co. v. Falconer Glass Indus., Inc*., 37 F.3d 25, 29 (1st Cir. 1994). Reconsideration is not a second chance at initial consideration. Thus, it is not appropriately used "raise arguments which could, and should, have been made before judgment issued . . . [or] to argue a new legal theory." *Falconer Glass*, 37 F.3d at 29.

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[5] The Claimant's motion is also timely based on section 802.206(c) of the BRB's regulations which provide that when a motion for reconsideration is sent by mail, and application of the ten day time limit would result in a loss or impairment of reconsideration rights, then the motion will be considered to have been filed as of the date of mailing. 20 C.F.R. § 802.206 (c). When, as in this case, there is no U.S. Postal Service postmark available and legible that can serve as *prima facie* evidence of the date of mailing, other evidence such as, but not limited to, certified mail receipts, certificates of service and affidavits may also be used to establish the mailing date. *Id.; Leete v. Petroleum Helicopters*, 15 BRBS 51, 52 (1982). The Claimant's certificate of service states that his motion was mailed on September 16, 2005. Accordingly, I find that the motion is timely because the date of mailing falls within the ten day filing period.

[6] While the Claimant relies on section 18.6 of the OALJ Rules of Practice and Procedure, it is noted that FRCP 7(b)(1) similarly provides that "[a]n application to the court for an order shall be by motion which…shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the . . . order sought."

2. The Claimant's Entitlement to Total Disability Compensation

BIW attacks the finding that the Claimant had established entitlement to an award of permanent total disability compensation on multiple grounds. First, it contends that suitable alternative employment existed because it was willing to accept and accommodate the Claimant's injury-related limitations identified by Dr. D'Angelo, a neurosurgeon. The arguments and evidence relating to the Claimant's limitations and whether BIW offered him suitable work tailored to his work-related physical limitations were fully considered and discussed in the decision and order. BIW has identified no manifest error of law or alluded to any newly discovered evidence. Instead, it urges a reweighing of the evidence with a different outcome. As this is not an appropriate use of reconsideration, the motion is denied with respect to the findings on the extent of the Claimant's work-related limitations and whether the work offered by BIW was suitable.

Next, BIW raises a new argument that suitable alternative employment accommodating the Claimant's limitations was available because the Claimant's craft administrator testified that BIW could have made work available within the restrictions recommended by Drs. Guernelli and Pier. R. Supporting Memo at 3, 6-7. As discussed in the August 31, 2005 decision and order, the craft administrator testified in response to a hypothetical question posed at his deposition that BIW could have accommodated restrictions against working on ladders and doing overhead work if such restrictions existed. Decision and Order at 11. However, a job within the employer's exclusive control is not suitable alternate employment unless it is offered to the injured worker. *See Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231, 234 (1984). As there is no evidence that the Claimant was ever offered a job that accommodated all of his physical limitations, I find that BIW has not established a basis for reconsideration of the finding that it failed to meet its burden of producing evidence demonstrating the availability of suitable alternative employment.

Lastly, BIW argues the Claimant is not entitled to ongoing total disability benefits because he left due to non-work-related emotional problems, and because there is no medical evidence which indicates that the Claimant should be out of work due to his psychological issues. R. Supporting Memo at 6. This is a reprise of an argument that was fully considered and discussed extensively in the initial decision. *See* Decision and Order at 9-12, 14-15. BIW has identified no manifest error of law or alluded to any newly discovered evidence. Once again, it asks for a reweighing of the evidence which is rejected as an inappropriate use of reconsideration.

For these reasons, BIW's motion for reconsideration is denied with respect to the finding that the Claimant is entitled to compensation for permanent total disability.

3. BIW's Entitlement to Special Fund Relief

BIW also seeks reconsideration the denial of its request for liability relief from the Special Fund pursuant to the provisions of section 8(f) of the LHWCA. R. Supporting Memo at 7-9. In order for BIW to be entitled to the Special Fund relief, it had to show that: (1) the employee had a permanent partial disability that existed prior to the second injury; (2) the second

injury contributed to that disability; and (3) the prior disability was manifest to the employer. Decision and Order at 16, citing *Bath Iron Works Corporation v. Director, OWCP*, 136 F.3d 34, 39 (1st Cir. 1998); *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 76 (1st Cir. 1992). In its motion, BIW argues that the record establishes that the Claimant had successive injuries at work that incrementally had the effect of increasing his permanent partial disability and the subsequent aggravations to his pre-existing conditions have increased his disability to a level of permanent total disability. R. Supporting Memo at 8. BIW further argues that the Claimant's resignation was due to his non-work related psychological condition, not his physical disability, which was heightened by the severe distress he was having in his home life. *Id.* BIW thus contends that it is entitled to Section 8(f) relief because the most recent date of injury is not totally incapacitating. *Id.*

In the initial decision, I found that there was insufficient evidence prior to the most recent injury of June 9, 2002 to have put BIW on notice that the Claimant suffered from such a serious back condition that it would have been motivated to terminate the Claimant in order to eliminate the risk of compensation liability. Decision and Order at 17; *CNA Insurance Co. v. Legrow*, 935 F.2d 430, 435 (1st Cir. 1991). It may well be, as BIW contends, that the Claimant's successive injuries incrementally contributed to a deteriorating condition. However, BIW has not shown that the Claimant received any significant treatment, lost any time from work, or was diagnosed with anything more than temporary strains prior to his most recent injury. This dearth of evidence was the basis for the finding that there was "insufficient evidence prior to the most recent injury of June 9, 2002 to have put BIW on notice that the Claimant suffered from such a serious back condition that it would have been motivated to terminate the Claimant in order to eliminate the risk of compensation liability." Decision and Order at 17. BIW has not shown that this finding is tainted by manifest legal error, and it has offered no newly discovered evidence.

Regarding BIW's argument as to the Claimant's underlying psychological problems, I found that BIW had not established that the Claimant's pre-existing, manifest psychological disability contributed to his permanent total disability and that the most recent injury alone did not permanently and totally disable the Claimant. Decision and Order at 17. However, simply proving that the Claimant had a prior disability is not enough; BIW must show that the second injury by itself would not have led to total disability. *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990); *See also E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1353 (9th Cir. 1993); *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 797 (2d Cir. 1992). As I found in the August 31, 2005 decision and order, the evidence of record establishes that even without any contribution from psychological limitations, the Claimant would still be found totally disabled based solely on BIW's failure to establish the existence of suitable alternative employment available. Decision and Order at 17. BIW has not presented any newly discovered evidence, and it has not identified manifest error of law.

The arguments raised by BIW in its motion for reconsideration were discussed and considered in the decision and order. As BIW has not established a basis for reconsideration, its motion is denied in regard to entitlement to Special Fund relief.

4. Average Weekly Wage and Compensation Calculation

In the decision and order, I based the Claimant's permanent total disability compensation on his average weekly wages of $416.14 calculated as of the date of his most recent injury on June 9, 2002. Decision and Order at 16. In making this finding, I noted that BIW did not address the issue of average weekly wages, and that the Claimant had only stated in his post-hearing brief, without any supporting argument, that average weekly wages of $702.90, which were calculated as of a September 24, 1999 injury, should be used. *Id.* I rejected the Claimant's position for the following reasons:

> Where, as in this case, a worker suffers successive injuries which individually do not result in any diminution of wage-earning capacity, compensation is based on the average weekly wages as calculated at the time of the most recent injury for which compensation is claimed. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 193 (1984). *See also Kooley v. Marine Industries Northwest*, 22 BRBS 142, 146-147 (1989). Since the Claimant has not demonstrated any loss of wage-earning capacity as a result of any of his successive work-related injuries prior to June 9, 2002, his compensation must be based on the average weekly wages calculated as of the date of his most recent injury. Using the higher 1999 average weekly wages urged by the Claimant would result in BIW compensating him for economic losses that are not the result of his occupational injuries. Rather, these losses are the likely product of non-compensable factors such as reduction in the amount of available work or time missed due to the Claimant's family and psychological problems for which no claim has been asserted. Therefore, the Claimant's compensation will be based upon his average weekly wages of $416.14 at the time of his most recent compensable injury on June 9, 2002.

Id. In his motion for reconsideration, the Claimant asserts that the determination as to the average weekly wages and resulting compensation rate are "contrary to law and not supported by the facts in this record." Cl. Motion at 4. In support of this contention, the Claimant argues that $416.14 does not reflect his pre-injury earning capacity and that his average weekly wages should not have been calculated under section 10(a) of the LHWCA because he did not work substantially the whole year prior to June 9, 2002 and because the record does not provide the information needed to determine the number of days that the Claimant worked prior to his 2002 injury. Cl. Motion at 3-4. Section 10(a) applies in cases where the injured employee "worked in the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a). In his motion for reconsideration, the Claimant states that he did not work at all during 23 of the 52 weeks preceding the June 9, 2002 date of injury and that he only worked one day during six other weeks. Cl. Motion at 3. He further submits that having recognized that depression and family problems may account for the time missed from work during the 52-week period preceding the June 9, 2002 injury, I was "required to compute the wage in a way that excludes the impact of Mr. Vallee's depression as long as the lost time before the last injury was not typical of his employment history as a whole." *Id.* at 4, citing *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 219 (1991) and *Klubnikin v. Crescent Wharf Warehouse*, 16 BRBS 182, 186 (1984).

There are several problems with the Claimant's arguments. First, they were made for the first time in the motion for reconsideration which is not a forum for advancing arguments and legal theories which could, and should, have been made before the decision issued. Second, the Claimant is incorrect in asserting that section 10(a) is inapplicable simply because he missed days from work due to non-occupational depression and family stress. The question of whether the Claimant worked "substantially all of the year" for purposes of determining the applicability of section 10(a) is not based on the number of weeks worked but whether his employment is properly characterized as "intermittent or permanent." *Duncan v. Washington Metro. Area Transit Auth*., 24 BRBS 133, 136 (1990). The record shows that the Claimant worked for BIW for 16 years from 1987 until his resignation in 2004. Decision and Order at 3. There is no evidence that his employment was intermittent, seasonal, irregular, part-time or anything other than permanent. Moreover, because section 10(a) "aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation." *Duncan*, 24 BRBS at 136. Contrary to the Claimant's argument that he is penalized by the application of section 10(a), a claim that is reinforced by erroneous *dicta* in the decision and order, the section 10(a) formula actually benefits a worker who does not work every available work day during the relevant 52-week period.[7] That is, the section 10(a) computation takes a worker's total earnings over the 52-week period, divides that total by the number of days actually worked to produce an average daily wage, then multiplies the average daily wage by the total number of available workdays (300 for a six-day worker or 260 for a five-day worker), and divides the product by 52 pursuant to section 10(d) to arrive at the average weekly wage. Consequently, the average weekly wage computed under section 10(a) for a worker who did not work on every available workday will necessarily produce an average weekly wage that is higher than the worker's actual average weekly earnings over the same period. Therefore, the fact that the Claimant's average weekly wages computed as of June 9, 2002 are lower than his average weekly wages computed under section 10(a) for earlier dates of injury, an injustice in the Claimant's eyes, cannot be attributable to the Claimant's missing time from work due to illness, but rather is likely due to other factors such as a reduction in the amount of overtime which would properly be reflective of the Claimant's actual wage-earning capacity. Third, a determination of an employee's average weekly wages must be rational and based on substantial evidence; *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991); and the Claimant, as the party contending that the actual wages are not representative, bears the burden of producing supporting evidence. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 1179 (9th Cir. 1976). In this case, the Claimant offered no testimony or other reliable evidence explaining why he was unable to work during any of the 52 weeks prior to June 9, 2002 or why his actual earnings over the 52 weeks preceding June 9, 2002 are not fairly representative of his actual earning capacity. Indeed, the $416.14 average weekly wages figure is based on wage records and calculations which were introduced by BIW with objection from the Claimant who introduced no countervailing evidence

[7] In the August 31, 2005 decision and order, I suggested that the Claimant's lower earnings over the 52-week period preceding the June 9, 2002 date of injury in comparison to earlier periods "are the likely product of non-compensable factors such as reduction in the amount of available work or time missed due to the Claimant's family and psychological problems for which no claim has been asserted." While a reduction in the amount of available work, particularly overtime work, may account for this reduction in earnings, days not worked due to illness or any other reason do not, as explained above, lower a worker's average weekly wage under the section 10(a) formula.

to show that these calculations are incorrect. Finally, the *Browder* and *Klubnikin* cases cited by the Claimant are inapposite as they involve calculations under section 10(c), not section 10(a) which I find was properly applied in this case.[8]

Based on the foregoing, I find that the Claimant has failed to establish that the calculation of his average weekly wages and compensation rate involves any manifest error of law. Since the Claimant has also not offered any newly discovered evidence that is relevant to this issue, his motion for reconsideration of the average weekly wages determination is denied.

5. BIW's Liability for Medical Care Provided by Dr. Guernelli

BIW denied responsibility for the cost of the medical care provided to the Claimant by Dr. Guernelli on the ground that the Claimant failed to obtain its prior written consent before initiating treatment with Dr. Guernelli. The Claimant failed to address this issue at the hearing or in his post-hearing brief. In the August 31, 2005 decision and order, I found merit to BIW's position and concluded that BIW could not be held liable for the expenses of Dr. Guernelli's care because the Claimant had not shown that he obtained prior written approval or that he was effectively denied further medical treatment before he changed physicians to Dr. Guernelli. Decision and Order at 18. The Claimant now seeks reconsideration of this determination, arguing that BIW's consent was not required before the Claimant was seen by Dr. Guernelli because Dr. Guernelli is a specialist. Cl. Motion at 2. In this regard, the Claimant asserts that he initially chose Dr. Bergeron, his primary care physician, who first referred him for evaluation by Dr. D'Angelo, a neurosurgeon who ruled out surgery, and then to Dr. Guernelli, a physiatrist specializing in pain management. *Id.* The Claimant additionally argues that BIW's prior authorization for Dr. Guernelli was not required under *Swain v. Bath Iron Works Corp*., 14 BRBS 657, 664 (1982) because BIW controverted all of his claims for medical and disability benefits effective January 26, 2004 (CX 1 at 18; CX 13 at 161), more than two months before the Claimant was seen by Dr. Guernelli. *Id.*[9] BIW acknowledges that there is an exception to the prior consent requirement when a worker is referred to a specialist, but it argues that coverage of the care provided by Dr. Guernelli should nonetheless be denied because the Claimant was already treating with other specialists, Drs. Desai, Pier and D'Angelo. BIW Opposition at 3-4.

In *Armfield v. Shell Offshore*, 25 BRBS 303, 309 (1992), the Board held that an employer's authorization is not required when the physician first chosen by an employee refers him to a specialist needed for appropriate care. *See also* 20 C.F.R. § 702.406(a) (2004); *Slattery*

[8] In *Browder* and *Klubnikin*, the Board held that it is within an ALJ's broad discretion under section 10(c) to consider what a claimant would have earned but for non-recurring events such as a strike, personal illness or accident. *Browder*, 24 BRBS at 219 (the claimant's average weekly wage accounted for the weeks that the claimant would have worked but for the non-recurring event of her mother's funeral); *Klubnikin*, 16 BRBS at 186 (the claimant's average weekly wage accounted for the weeks that the claimant would have worked but for the non-recurring non-work related injury from a car accident). As explained above, the section 10(a) formula automatically makes an adjustment for available workdays that were not worked for any reason.

[9] In *Swain*, the Board held that when an appropriate specialist is chosen as a claimant's initial free choice of physician, the employer is not required to give authorization to change physicians to another specialist, and the employer is not responsible for medical expenses for a second specialist seen by the claimant without its authorization). 14 BRBS at 664.

Assocs. v. Lloyd, 725 F.2d 780, 786 (D.C. Cir. 1984). There is no dispute that Dr. Bergeron, the physician initially chosen by the Claimant, is not a specialist. While BIW is right that Dr. Bergeron previously referred the Claimant to three other specialists, the record shows that Drs. Desai, Pier and D'Angelo are all neurosurgeons, and BIW has introduced no evidence to show that Dr. Bergeron's decision to refer the Claimant to Dr. Guernelli, a pain management specialist, after surgery had been ruled out was not medically appropriate. Dr. Guernelli is a board-certified physiatrist specializing in physical medicine and rehabilitation, pain management and electrodiagnostic medicine. Decision and Order at 6-7. *Cf. Senegal v. Strachan Shipping Co*., 21 BRBS 8, 11 (1988) (employer not required to consent to care by a pulmonary specialists where the initial physician had already sent the claimant to other pulmonary specialists, thus providing appropriate specialists whose services were necessary for proper care and treatment).

In my view, the Claimant has shown that the denial of coverage for the care provided by Dr. Guernelli was a manifest error of law. Although I am troubled that the Claimant's arguments in support of coverage were made for the first time in his motion for reconsideration, I conclude that the interests of justice and the humanitarian purposes of the LHWCA must prevail in cases of clear error over considerations of finality. Accordingly, the Claimant's motion is allowed with respect to the issue of Dr. Guernelli's care.

III. Order

For the foregoing reasons, the Respondent's motion for reconsideration is DENIED *in toto*. The Claimant's motion for reconsideration is GRANTED with respect to BIW's liability for medical care received from Dr. Guernelli and DENIED with respect to the finding that the average weekly wage of $416.14 best represents the Claimant's pre-injury earning capacity. Accordingly, the compensation order is amended to read as follows:[10]

(1) Bath Iron Works Corporation as a self-insured employer shall pay to the Claimant Steven M. Vallee temporary total disability compensation pursuant to 33 U.S.C. Section 908(b) from February 3, 2003 through April 28, 2003 based on an average weekly wage of $416.14 which yields a compensation rate of $277.43 per week, plus interest on all past due compensation computed from the date each payment was originally due until paid, and the appropriate rate shall be determined pursuant to 28 U.S.C. Section 1961 (2003) as of the filing date of this Decision and Order with the District Director;

(2) Bath Iron Works Corporation as a self-insured employer shall pay to the Claimant Steven M. Vallee permanent total disability compensation pursuant to 33 U.S.C. Section 908(a) at the rate of $277.43 per week commencing on April 16, 2004 and continuing until further order, plus the applicable annual adjustments provided in 33 U.S.C. Section 910 and interest on all past due compensation, computed from the date each payment was originally due until paid. The appropriate rate shall be determined pursuant to 28 U.S.C. section 1961 (2003) as of the filing date of this Decision and Order with the District Director;

[10] The entire compensation order has been set out for ease of reference. The only change on reconsideration is to paragraph (4).

(3) The Claimant's attorney shall have 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. Section 702.132 (2004), and the Employer and Carrier shall have 15 days from the filing of the fee petition to file any objection; and

(4) Bath Iron Works shall pay the expenses of the Claimant's care from Dr. Guernelli until further order;

(5) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts